Fair Political Practices Commission
MEMORANDUM

TO: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

FROM: C. Scott Tocher, Counsel, Legal Division
Luisa Menchaca, General Counsel

DATE: March 25, 2004

SUBJECT: Prenotice Discussion: Sections 85301, 85302, 85303 and 85310 – Expenditures for Communications Featuring Candidates; Contribution Limits on Candidate-Controlled Ballot Measure Committees; Draft Amended Regulation 18531.5 (Recall Elections); Draft Regulation 18530.9 (Contributions to Candidate Controlled Ballot Measure Committees); Draft Regulation 18531.10 (Communications Identifying State Candidates).

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EXECUTIVE SUMMARY

Following on the Commission's general discussion of the issues surrounding application of section 85310 in January of this year, this memorandum serves to inform the prenotice discussion of section 85310 specifically and the propriety of contribution limits on ballot measure committees generally. As the Commission is aware, the experience of the recent gubernatorial recall election has raised the issue of whether campaign contribution limits should apply to ballot measure committees that are controlled by candidates when payments are made for advertisements in which the candidate appears. The Commission is asked to consider here, though not necessarily conclude, whether a candidate may be said to "behest" payments from his or her own committees. Another issue is whether ballot measure committees may, within constitutional constraints, be subject to contribution limits. The Commission has advised that such committees are not subject to contribution limits. Pursuant to the Commission's directive, staff held an interested persons' meeting in February to obtain input to assist the Commission regarding these issues. After reviewing important preliminary questions implicated by section 85310 and other provisions, the memorandum proposes regulatory language be noticed to elicit further public input to help inform the Commission's decisions.

Recommendation: Staff recommends the Commission proceed with each of the approaches described below, maintaining the optional language in all decision points (with the exception of "Option 5A" language in regulation 18531.10) to facilitate the broadest possible commentary and input. In light of the multiple complex issues that require resolution, the Commission may elect to proceed with another pre-notice discussion in June before considering final adoption in August. On the other hand, should the Commission feel comfortable narrowing the issues significantly at the April meeting, staff will be prepared to present the matter for permanent adoption in June.

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I. INTRODUCTION.

While the direct democracy tool of the ballot measure has been in existence for nearly a century, only relatively recently has the ballot measure been used to a significant degree. What was once a last resort now is a standard fixture on the ballot. The strategic importance of the ballot measure, once the chosen method for special interest groups to circumvent an uncooperative Legislature or governor to enact favored laws, has expanded to include public officials themselves. Though the reasons for this shift may be more complicated in a particular situation, there can be no dispute that one attraction of the ballot measure committee to the candidate is that in this post-Proposition 34 world the ballot measure committee affords an opportunity for a candidate to raise unlimited campaign funds. By aligning himself or herself with a ballot measure committee, the candidate is free to raise and spend unlimited sums with regard to an issue, perhaps simultaneous to running for election to office. Recent experiences during the historic recall election and primary election show the utility of these committees to candidates. It has been suggested that section 85310 of the Act may provide a check on the potential for evasion of contribution limits to candidates who use ballot measure committees as surrogate campaign committees.

Section 85310 requires, among other things, reporting of certain payments made for communications that identify, but do not expressly advocate for, a state candidate.

The relevant portions of section 85310 are as follows:

> "**§ 85310. Communications Identifying State Candidates.**
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> "(a) Any person who makes a payment or a promise of payment totaling fifty thousand dollars ($50,000) or more for a communication that clearly identifies a candidate for elective state office, but does not expressly advocate the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise published within 45 days of an election, shall file online or electronically with the Secretary of State a report disclosing the name of the person, address, occupation, and employer, and amount of the payment. The report shall be filed within 48 hours of making the payment or the promise to make the payment.
> …
> "(c) Any payment received by a person who makes a communication described in subdivision (a) is subject to the limits specified in subdivision (b) of Section 85303 if the communication is made at the behest of the clearly identified candidate."

In 2002, the Commission adopted regulation 18539.2 to describe the method and substance of those reports. In the first quarter of 2003, the Commission adopted a fact sheet discussing the applicability of the recall election statute, 85315, in the context of the recall

election. In July, the Commission adopted regulation 18531.5, which concluded that committees formed primarily to oppose or support the recall election were *not* subject to contribution limits. (Reg. 18531.5, subd. (b)(3).) The Commission followed up this regulation by revising its Recall Fact Sheet the following month. In August, the Commission, on the basis of long-established Commission policy and the case of *Citizens Against Rent Control v. Berkeley,* (1981) 454 U.S. 290, advised that replacement candidates could control ballot measure committees formed primarily to support or oppose the recall election and that such committees were not subject to the contribution limits of the Act. As discussed below, the Commission's interpretation of the scope and extent of section 85310 may cause the Commission to revisit its prior policies regarding contribution limits and ballot measure committees.

II. PRELIMINARY ISSUES.

Of the many provisions of Proposition 34 that the Commission has interpreted since the proposition's passage in 2000, section 85310 presents some of the most difficult issues to be resolved. While, generally speaking, any Commission interpretation fundamentally asks what a given statute means, the answer to that question in the case of section 85310 is particularly difficult. Because the statute is but a small part in a much larger proposition, and because the statute's provisions were not discussed in any detail during the campaign with the voters, little exists with regard to the intent of the voters to illuminate the Commission's work. Thus, the Commission's task is shaped not only by rules of statutory construction but also other structures in the Act, constitutional law and context. The following discussion in this section discusses four primary subjects that will shape the interpretation of specific provisions in section 85310. As will be seen, the Commission ultimately must make fundamental decisions about the following issues before or coextensive with the adoption of regulatory language.

A. The First Amendment and Limitations on Contributions to Ballot Measure Committees.

Given that section 85310 seeks to govern broadly – reaching "any person" and "any payment" – the statute potentially reaches every type of committee known to the Act – ballot measure committees (controlled and uncontrolled by candidates), general purpose committees, primarily formed committees, non-committees, et cetera. Of these types of committees, the most potentially controversial application of subdivision (c) of section 85310 is whether the statute operates to effect a contribution limit on ballot measure committees.[1] Candidates or non-

[1] Though not specifically defined in the Act, ballot measure committees are committees formed to support or oppose ballot measures, as opposed to candidates. Ballot measure committees can be further divided into those that are said to be "primarily formed" and those that are said to be "general purpose" ballot measure committees. A "primarily formed" ballot measure committee is a "committee" (defined as a person or group of persons who have received contributions totaling at least $1,000 in a calendar year) which is formed or exists primarily to support or oppose a single measure or two or more measures being voted upon the same city, county, multicounty or state election. (§ 82047.5.) A "general purpose" ballot measure committee is a committee which is formed or exists primarily to support or oppose more than one ballot measure, except as provided above.

candidates may control ballot measure committees. Senator Ross Johnson and others have suggested that section 85310 places a contribution limit on candidate controlled ballot measure committees specifically. As the Commission is aware, however, there is long-standing constitutional authority for the principle that ballot measure committees are protected by the First Amendment from the imposition of contribution limits on them. The recent United States Supreme Court case, *McConnell v. FEC*, however, suggests grounds may exist for constitutional application of limits on ballot measure committees in certain circumstances. In thinking about whether limits may be applied, one must be aware that whether a candidate controls the ballot measure committee may have a pivotal outcome on the issue of whether limits may be applied.

1. Citizens Against Rent Control v. Berkeley (1981).

The seminal case from the United States Supreme Court that speaks to the validity of contribution limits applied to ballot measure committees is *Citizens Against Rent Control et. al. v. City of Berkeley* (1981) 454 U.S. 290. At issue in this case was a Berkeley, California, ordinance that placed a $250 contribution limit, among other things, on contributions to committees formed to support or oppose ballot measures submitted to the city voters. An association, Citizens, brought suit seeking to have the ordinance overturned, alleging the contribution limit violated the association's First Amendment rights.

The Supreme Court agreed with the association and struck down the ordinance. The Court distinguished the *Buckley v. Valeo* case, which upheld contribution limits to candidates in order to prevent corruption or its appearance, on the ground that there is no risk of corruption when contributions are made to committees favoring or opposing ballot measures. Agreeing with the distinction made after *Buckley* by several courts of appeal in the country, the Court said:

> "Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions." (*Citizens, supra*, 454 U.S. at p. 299.)

Put another way, the notion goes that while a candidate can be corrupted by large contributions, ballot measures, because they are an issue and not a person, cannot be so corrupted. This is based on the *Buckley* and *Citizens* notion that the only justification for limiting protected political speech is to avoid corruption or its appearance. It is critical, however, to note that the ballot measure committee at issue before the *Citizens* Court was *not* a candidate-controlled committee. Indeed, no published case has ever determined whether the rule in *Citizens* might be limited in the event the committee is controlled by a candidate. Nevertheless, the Court's recent

pronouncements in a case involving the federal government's recent campaign finance reform measure, known commonly as BCRA, suggest that there exist new grounds in the Court's thinking that might justify limits if applied to candidate controlled ballot measure committees, if not non-controlled committees, as well.

2. McConnell v. Federal Election Commission (2003).

The Supreme Court decision in *McConnell, United States Senator, et al. v. Federal Election Commission, et al.*, 124 S.Ct. 619, 157 L.Ed. 2d 491 (2003), already has been the subject of an extensive staff analysis provided the Commission at the February meeting this year.[2] The seventeen page staff memorandum provides a comprehensive analysis of the nearly three hundred page decision of the Court that cannot be improved upon here. Rather, several key holdings and statements from the Court about the Bipartisan Campaign Reform Act of 2002 ("BCRA") will be highlighted to indicate the development of the Court's thinking since the landmark *Buckley* decision.

As stated earlier, the *Buckley* decision, as well as *Citizens*, was premised on the notion of *quid pro quo* corruption and its appearance – the exchange of money for a vote or other specific action. (*See Buckley v. Valeo*, 424 U.S. 1, 28.) The *McConnell* case, however, discusses three principles that expand on *Buckley* and provide the arguments that might one day be used to justify limits on contributions to at least candidate-controlled ballot measure committees.

First, the Court recognizes that the important governmental interests that support regulation of First Amendment political activity extends not just to the elimination of *quid pro quo* exchanges, or the appearance of money-for-votes, under *Buckley*, but extends also to "undue influence on an officeholder's judgment, and the appearance of such influence." (*McConnel, supra*, 124 S.Ct. at p. 660, *citing Federal Election Comm'n v. Colorado Republican Federal Campaign Comm*. (2001) 533 U.S. 431.) This view, then, is confined not solely with the concern for bribery or the appearance of bribery but to "the broader threat from politicians too compliant with the wishes of large contributors." (*Id*.) These interests are sufficient, then, not only to justify contribution limits themselves but also "law preventing the circumvention of such limits." (I*d*.)

Second, *McConnell* recognizes the critical importance, and potential for abuse, in activities that are coordinated with the candidates. Here, *McConnell* makes the link between contributions to groups or entities affiliated with candidates and connects those contributions to the candidates themselves. For instance, BCRA attempts to close the "soft money" (unlimited contributions) spigot to political parties by enacting limits on those contributions. As to this provision of the law, the Court discussed the evidence in the record regarding the use of soft money and how such contributions were a tool of influence practiced not only by the contributors but also candidates themselves:

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[2] The staff memorandum may be found on the Commission's website, www.fppc.ca.gov, under the past agenda link, for the February 10, 2004, meeting.

> "Many contributions of soft money were dramatically larger than the contributions of hard money permitted by FECA. … Such practices corroborate evidence indicating that many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.
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> "Not only were such soft-money contributions often designed to gain access to federal candidates, but they were in many cases solicited by the candidates themselves. Candidates often directed potential donors to party committees and tax-exempt organizations that could legally accept soft money. …" (*Id.*, at pp. 649-650.)

The Court cites in the record evidence making the critical connection between so-called issue advertisements and the candidates those advertisements support:

> "One former party official explained to the District Court:
> 'Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party …, or an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign.'" (*Id.*, at p. 650.)

Thus, the coordination between candidates and the soft-money political party committees to which they directed contributions leads to greater access to the candidates themselves:

> "…Many of the 'deeply disturbing examples' of corruption cited by this Court in *Buckley*, 424 U.S., at 27, to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. [Citation omitted.] Even if that access did not secure actual influence, it certainly gave the 'appearance of such influence.' [Citation omitted.]"
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> "The record in the present case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations. …" (*Id.*, at p. 664.)

Limiting the notion of corruption as occurring only in cases of *quid pro quo* situations, the Court warns, "ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation." (*Id.*, at p. 665.)

The third important area of comment by the Court occurs with respect to "issue advertising." In *Buckley*, the Court determined that government regulation (and limits) could only reach funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. (*Buckley, supra,* 424 U.S. at p.80.) As a result, if a communication did not use the "magic words" of "elect John Doe" or "vote against Bill Smith," such a communication was an issue advertisement and not subject to limitation. In other words, express advocacy was subject to the contribution limits but soft money could be used to sponsor issue ads, not subject to contribution limits nor disclosure requirements as to their sponsors. The *McConnell* Court, however, rejected as fiction such a distinction, and thus upheld BCRA's regulation (prohibition of use of soft money) of such advertisements within proximity to an election if the advertisement mentions a federal candidate:

> "While the distinction between "issue" and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. … Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election.
>
> "…"
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> "… <u>As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on "issue" advocacy</u>." (*Id*., at pp. 650-652; emphasis added.)

Thus, the availability of soft money outlets for contributors and candidates results in an irresistible temptation to use these outlets as a method to conduct political campaigns outside the applicable hard money limitations.

Applying these observations to the context of ballot measures in California and determining whether contribution limits under either sections 85301,85302 or 85310 are permissible, one sees the parallels to the harms that were the focus of redress in BCRA. Certainly, just as candidates closely affiliated themselves with the party committees and other groups and directed contributions to those groups for the benefit of their own campaigns, the ballot measure committee provides an equally viable avenue to avoid direct contribution limits to candidates. What is worse, however, is that candidates can actually control ballot measure committees in California. The history of association between candidates and ballot measure committees and the growing popularity of such arrangements undeniably illustrates that such

structures have the real potential for the type of corruption that BCRA sought to avoid – the selling of access and the pressure on contributors to gain that access or lose it to their competitors. The passages quoted above in *McConnell* likely would form the basis of arguments to courts in the future were limitations placed on candidate-controlled ballot measure committees. Whether contribution limits could constitutionally extend to non-candidate controlled ballot measure committees remains a different question. The constitutionality of contribution limits on ballot measure committees would necessarily depend on whether the case could be made that contribution such limits were necessary to prevent "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." (*Id*., at p. 656.) *McConnell* suggests that even if contribution limits on such non-candidate controlled committees were not permissible, some form of restriction on their conduct during election season, if they impact candidates for office, may be in some form subject to regulation.

Finally, Article III, section 3.5 of the California Constitution prohibits a state agency from refusing to follow a statute on the ground it is unconstitutional. On the other hand, an established rule of statutory construction requires the Commission to construe statutes to avoid "constitutional infirmit[ies]." (*United States v. Delaware & Hudson Co*. (1909) 213 U.S. 366, 407-408; *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 78; *see also Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 727-728.) Thus, where a statute is susceptible of two meanings, one of which would render the statute subject to constitutional challenge, the Commission should choose the alternative interpretation. Arguably this is not refusing to follow the statute in violation of the California Constitution because the Commission would be determining that the statute is not intended to reach such conduct. If, on the other hand, the Commission feels compelled by the statute's language that it *is* intended to reach ballot measure committees, either candidate controlled or not, then the California Constitution *requires* the Commission to adopt that interpretation and implement it until instructed otherwise by a court of appeal. (Cal. Const. Art. III, § 3.5.)[3]

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[3] The interaction of communications involving a candidate and a ballot measure has been the subject of litigation, but its impact here is unclear. In *Wax v. Fair Political Practices Commission* (E.D. Cal. 1992) CIV. S-90-1232, a registered voter, Lenore Wax, claimed two Commission emergency regulations impermissibly impaired her ability to learn of endorsements by her elected officials when deciding how to vote on particular candidates and ballot measures. Second, then Assemblyman Terry Friedman asserted the regulations impacted his ability to endorse ballot measures and from publicizing the endorsement of other candidates on his own reelection.

The Commission was permanently enjoined from: a) treating an expenditure by a ballot measure committee as a "contribution" to an individual running for office when the expenditure is made to publicize that individual's endorsement of or opposition to the ballot measure which that committee supports or opposes, unless the endorsement message being publicized includes express advocacy of the election or nomination of the endorsing individual; and b) treating an expenditure by a candidate's controlled election committee as a "contribution" to an individual running for office when the expenditure is made to publicize that individual's endorsement of, or opposition to the opponent of, the candidate whose controlled election committee is making the expenditure, unless the message being publicized includes express advocacy of the election or nomination of the endorsing individuals.

B. Are Payments by a Candidate Controlled Ballot Measure Committee Made at the Behest of the Controlling Candidate?

Subdivision (c) of section 85310 imposes a contribution limit to persons who pay for communications that feature a clearly identified candidate *where that communication is made at the behest of that candidate*. Logically, then, if the candidate that is clearly identified in the communication does *not* behest the communication, then no such contribution limitation would apply. To illustrate how the statute would work, if the Committee for Good Legislation decides it likes Senator Smith and decides to put up billboards all over the state identifying Senator Smith (but not expressly advocating for his election),[4] the expenditures for those billboards would be reportable under subdivisions (a) and (b) of section 85310. Subdivision (c), however, says that if those payments for the communication are made at the behest of the Senator, then contributions to the Committee for Good Legislation are limited to $25,000. The statute's operation in that scenario is fairly straightforward to imagine. The issue becomes more complicated, however, when Senator Smith controls the Committee for Good Legislation. Here, if the Committee made payments for communications regarding an upcoming ballot measure and identified the Senator, the $25,000 contribution limit to the Committee would not apply *if* the payments were not said to be made at the behest of Senator Smith. Senator Johnson has spoken before the Commission and urged that when a candidate controls a ballot measure committee, all payments made by that committee are necessarily made at the behest of the candidate and therefore the limits would apply. To evaluate that construction, one should begin by considering the meaning of the phrase "made at the behest" elsewhere in the Act and the consequences of its application in certain scenarios.

The term "made at the behest of a candidate" is found, among other places, in the definition of "contribution." (§ 82015.) Whether a given payment is a contribution or not has obvious consequences – a candidate must report contributions on campaign statements, disclose the sources of contributions, and of course those contributions are subject to the limits of sections 85301 and 85302 of the Act. In defining a contribution, the Act states that a "payment made at the behest of a candidate is a contribution to the candidate" unless an exception applies. (§ 82015, subd. (b)(2).)[5] Similarly, a payment made at the behest of a committee is a contribution

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However, when a candidate is running for office, what limitations may be placed on that candidate is unclear. Judge Karlton's order also states in paragraph 2, "[t]his litigation does not involve and the parties make no stipulation with reference to an expenditure made by a candidate's controlled ballot measure committee to publicize that candidate's endorsement of or opposition to the ballot measure that his or her controlled ballot measure committee support or opposes."

[4] One should note that section 85310 is not limited to communications involving ballot measures or made by recipient committees.

[5] One important exception, however, is found in subsection (b)(2)(D) of the same statute, which provides that a "contribution made at the behest of a candidate for a different candidate or to a committee not controlled by the behesting candidate is not a contribution to the behesting candidate." In other words, if Candidate "A" tells

to that committee. (§ 82015, subd. (b)(1).) Whether a payment is made at the behest of a candidate also is the critical defining component of whether a payment is an independent expenditure:[6]

> "**§ 82031. Independent Expenditure.**
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> 'Independent expenditure' means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election *but which is not made to or at the behest of the affected candidate or committee*." (Emphasis added.)

Given the importance, then, of determining whether the circumstances of a given transaction meet the requirement of being made "at the behest" of a candidate, the Commission adopted regulation 18225.7, defining that term. (The regulation is attached hereto as Exhibit "D".) As can be seen in the regulation, the term "at the behest" is broadly defined:

> "(a). 'Made at the behest of' means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code section 82031." (Reg. 18225.7, subd. (a).)

Thus, while the regulation includes obvious conduct such as a candidate requesting a given payment, it reaches much further to include conduct such as "consulting" or "cooperating" between the candidate and the person making the payment. And in what is important to the task of interpreting the specifics of subdivision (c) of section 85310, the regulation also includes payments made under the "control or at the direction of" a candidate.

Fleshing out the meaning of subdivision (a), subdivision (b) of the regulation further defines, but does not restrict, the broad definition in (a) by providing an illustration of the context in which the term applies:

Donor "B" to make a contribution to Committee "C," and that committee is not controlled by A, then B's contribution to C is *not* reported as a contribution to A, even though it was made at the behest of A.

[6] Generally speaking, if a payment can be characterized as an "independent expenditure," it is not considered a contribution to the candidate or committee that is the subject of the payment, and is therefore not subject to the contribution limits of the Act. For instance, if the committee "Citizens for Low Taxes" spends $500,000 on television commercials supporting a candidate in an Assembly race, that payment for the advertisements will not be a contribution (which would exceed the limits and be illegal) to the candidate *so long as* the payment is not made at the behest of the supported candidate.

> "(b) Expenditures 'made at the behest of' a candidate or committee include expenditures made by a person other than the candidate or committee, to fund a communication relating to one or more candidates or ballot measures 'clearly identified' … ." (Emphasis added.)

The question posed by section 85310, subdivision (c), in interpreting the meaning of "at the behest" is whether every payment made by a candidate's controlled committee is made "at the behest" of the controlling candidate.[7] Using the language of subdivision (a) above, it is easy to imagine interpreting "made at the behest" in the context of two parties – the candidate and some other group, such as a labor union or business association. The more difficult scenario arises, however, when the candidate is not coordinating an expenditure in the typical scenario out of someone else's account but instead simply makes an expenditure out of the candidate's own committee. Subdivision (a)'s broad language in regulation 18225.7 suggests the regulation may cover this conduct, but subdivision (b) suggests it may not.

With regard to the regulation, there is considerable evidence that the term "made at the behest" contemplates a necessary third party to the transaction producing the communication. Over the past two years, the Commission has considered and adopted amendments to regulation 18225.7.[8] In March of 2003, the Commission adopted amendments to this regulation. At that time, the Commission considered a draft of the regulation that contained a subdivision stating that expenditures "made at the behest" of a candidate or committee include expenditures "made by or through the candidate or committee." (Ex. to Staff Memo., "Expenditures at the Behest of Candidates or Committees. Adoption of Amendments to Regulation 18225.7; Adoption of Regulation 18550.1", 2/21/03, Draft Reg. 18225.7, proposed (b)(1).) During the hearing on the proposed amendments, it was observed by one commissioner that the proposed subdivision (b)(1) quoted above was "confusing" because "at the behest" implied that a third party was involved. (Minutes, Comm'n mtg. of 3/7/03, at p. 2.) Former Chairman Getman agreed, stating that an expenditure made by the candidate or by an agent of the candidate "is simply made by the candidate and is not behested." (*Id*., at pp. 2-3.) There was no objection to deleting the proposed language and the present language of regulation 18225.7 contains no such application.[9]

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[7] Once again, subdivision (c) of section 85310 states: "(c) Any payment received by a person who makes a communication described in subdivision (a) is subject to the limits specified in subdivision (b) of Section 85303 if the communication is made at the behest of the clearly identified candidate."

[8] Regulation 18225.7 has been the subject of prenotice and amendment adoption discussions by the Commission in July and September of 2002 and January and March of 2003.

[9] There are approximately a dozen references in the staff memoranda and minutes of Commission meetings that suggest to varying degrees agreement that the scope of "at the behest" addresses third-party transactions. See, for instance, the Prenotice Staff Memorandum, June 24, 2002, considered at the Commission's July, 2002 meeting, which introduces the context of the attempts to regulate "coordinated" expenditures:

> "… Contribution limits are thought by some to encourage the diversion of funds to expenditures by third persons on behalf of candidates, who would otherwise have received the funds directly, in the form of (larger) contributions. Third-party expenditures for or

In examining the impact of how a given interpretation will play out, it is helpful to remember that there are two types of committees controlled[10] by a candidate – 1) his or her election committee for a given office; and 2) all other committees, such as general purpose or primarily formed committees for the purpose of supporting or opposing ballot measures. Some have suggested that subdivision (c) applies to a candidate's controlled ballot measure committee, implying a broad reading of the regulation based on the notion that since the candidate controls the committee, every payment by the committee is made under the "control or at the direction of" a candidate. Certainly, subdivision (a) of regulation 18225.7 lends support to such an interpretation. The Commission, however, has never applied this reasoning in the context of candidate controlled committees.

Setting aside for a moment the second type of candidate controlled committee identified above, applying the term "at the behest" to a candidate's own elective office committee may lead to absurd results. Since a payment that is made "at the behest" of the candidate is a contribution to the candidate, any expenditure by a candidate's own campaign committee would result in a contribution from his or her own committee to the candidate himself or herself. Sections 85301 and 85302, which establish contribution limits, would prevent the candidate's own committee from spending in excess of the limits (approximately $6,400 for an entire primary and general Assembly seat election). Such an absurdity results from a mechanical application of the regulation if one assumes that every payment made by a controlled committee is made at the behest of the candidate by virtue of that control. Instead, such payments are simply considered direct payments by the candidate – the candidate and his or her committee in this context are

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> against candidates have been rising in jurisdictions all across the country, however, and it does not appear that this trend is driven exclusively by the increasing popularity of contribution limits. …
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> "Expenditures on campaign speech and thinly veiled 'issue advocacy,' when ostensibly made by persons other than candidates, may or may not be the products of campaigns coordinated with candidates. …"

[10] Section 82016, subdivision (a) defines a "controlled committee" broadly:

"(a) 'Controlled committee' means a committee that is controlled directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, his or her agent, or any other committee he or she controls has a significant influence on the actions or decisions of the committee."

The Commission has interpreted the definition of "controlled committee" to include any significant participation by a candidate, his or her agent, or representatives of any other committee he or she controls in the actions of a committee. To determine whether a candidate controls a committee, staff looks at the degree of the candidate's involvement in the committee's activities. The involvement of a candidate includes the involvement of his or her campaign committee and his or her agents. (*Harrison* Advice Letter, No. A-03-201; *Davis* Advice Letter, No. I-90-173.)

considered one and the same. As to controlled ballot measure committees, the term also has not been applied there to suggest that payments for communications by those committees are contributions to the controlling candidate.[11]

In the end, we see that that while regulation 18225.7 does not preclude application of the term "at the behest" to a candidate's controlled committee, it is uncertain whether it ever was intended to so apply. Furthermore, there is no historical basis of application in such contexts on which to rely. Of course, the fact that the regulation may not contemplate such a result does not necessarily mean such a result may not follow – legally speaking. Since, however, applying the term "at the behest" to a candidate's own controlled ballot measure committee would be a departure from other contexts, such as the elective office committee, one might ask where the authority – in either the regulation or the statute – exists for such a distinction. The answer may lie in the Commission's general authority to interpret the law and its own regulations in a manner that furthers the purposes of the Act without rendering the law it construes absurd or unworkable. (§ 83112.)

In the final analysis, the regulation does not compel the unprecedented construction that, in the limited context of candidate controlled committees *other* than his or her elective office committee, a candidate may be said to behest payments from his or her controlled committee. Nevertheless, failing to include candidate controlled committees under section 85310 leads to an oddly disparate treatment of candidate versus non-candidate controlled committees, which itself may lead to Equal Protection problems. Including candidate controlled committees resolves potential imbalances and buttresses the contribution limit scheme but extends the concept of "at the behest" in uncharted territory.

C. What was the Voters' Intent?

Regardless of what the Commission determines the statute *can* do, one must also ask what the statute is *intended* to do. The "legislative intent" in construction of a voter-passed measure is *not* the intent of the Legislature but the intent of the *voter*s. (*Taxpayers to Limit Campaign Spending v. F.P.P.C.* (1990) 51 Cal.3d 744, 764.) Regardless of what the legislative drafters may have intended, if that interpretation was not made known to the voters then it cannot be said that the voters embraced or shared that interpretation. (*Id*., at p. 764, fn. 10.)

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[11] This result may be due, in part, to the exception to the term "contribution" found in section 82015 and regulation 18215, subdivision (c)(4), which states that a "contribution" does not include:

> "(4) A payment made at the behest of a candidate, which is for a communication by the candidate or any other person, that meets all of the following:
> (i) Does not contain express advocacy;
> (ii) Does not make reference to the candidate's candidacy or his or her opponent's qualifications for office; and
> (iii) Does not solicit contributions to the candidate or to third persons for use in support of the candidate or in opposition to the candidate's opponent."

The Court, in *Watson v. FPPC* (1990) 217 Cal.App.3d 1059, reiterated the well-settled rule that "[t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." In *Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, the court held that "The words [of an initiative] must be read in a sense which harmonizes [them] with the subject matter and the general purpose and object of the amendment, consistent of course with the language itself." In a comprehensive discussion of the canons of statutory construction, the Court, in *Metropolitan Water District of Southern California, et al. v. The Superior Court of Los Angeles County*, (2001) 2001 WL 1230457 (Cal.App. 2 Dist.), noted that "…consideration must be given to the consequences that will flow from a particular interpretation." The Court said that the final step in statutory construction "…is to apply reason, practicality, and common sense to the language at hand."

In the case of section 85310, there unfortunately is little to no evidence to illuminate the intent of the voters with respect to subdivision (c). While the ballot pamphlet materials sent to all voters described generally that Proposition 34 "establishes limits on contributions to candidates for state elective office," there is no more discussion of how those limits do or do not apply in the context of advertisements which clearly identify the candidate and are made at his or her behest. Moreover, no discussion of the proposition ever put forth the notion that it was intended to apply limits to ballot measure committees, a noteworthy issue in light of the *Citizens* case on point. The Commission turns to guidance, then, on the context of the statute within the contribution limit scheme itself.

How, precisely, context cuts in the instant matter is debatable, however. Since there are no contribution limits on the candidate's pre-34 committee and because there are no contribution limits on ballot measure committees, there arguably are no contribution limits that are being protected by section 85310. If, however, one changes the focus to the *candidate* making the expenditure out of his or her ballot measure committee, then one could argue that section 85310 supports the contribution limit scheme in place with respect to *candidates*. While plausible, the problem with such a construction is that there is no indication in the record that this was the intent of the statute. Certainly if it was the intent then a logical question arises – if section 85310, subdivision (c), was meant to buttress candidate contribution limits, then why is the amount referenced ($25,000) in 85303, subdivision (b), more than eight times the amount otherwise applicable to Senate and Assembly candidates, two and a half times larger than the limit for statewide candidates (except for governor), and $5,000 more than governor? It seems only logical that a limitation placed to prevent circumvention of the limits on candidates would actually cite to the provisions limiting contributions to candidates (sections 85301-85302) instead of limitations on contributions to political parties (section 85303, subdivision (b)).

This leads to speculation that the statute was intended to supplement the contribution limit provisions applicable to political party committees in section 85303, which establishes a $25,000 limit on contributions to political parties for the purposes of making contributions to support or defeat state candidates. For all other purposes, contributions to political parties are unlimited. Under one theory, section 85310, subdivision (c), assures that political parties do not,

by not expressly advocating the election or defeat of a candidate, bypass the $25,000 limit on funds used to make such expenditures when they *do* expressly advocate regarding the candidate. In this way, section 85310 reaches political party soft money issue advertisements that were thought to plague federal elections. Of course, while plausible there is nothing in the record to indicate that this was in fact the purpose behind the statute, and the language indeed covers a broader category of committees than just political parties.

D. Other Regulatory Approaches.

Part of the public's strong reaction to conduct during the recent recall election and subsequent primary election has led to the search for a means within the Act to curtail what is thought to be abuses by candidate controlled ballot measure committees, especially insofar as the use of such committees is seen as an end-run around candidate contribution limits. Certainly no one argued, prior to the fundraising of recall candidate Cruz Bustamante, that section 85310 placed limits on ballot measure committees – regardless of whether they are controlled by candidates. That long-standing advice was not questioned in any regard when the recall fact sheet and regulation (18531.5) were adopted in the summer of 2003. As can be seen from the prior discussion, however, there is reason to doubt whether, in fact, section 85310 provides controls on ballot measure committees. Certainly, the limitations of the statute itself (non-express advocacy, clearly identified candidates in the communications, made within 45 days of an election, made at the behest of the candidate, et cetera) are substantial even if they do in fact apply to all ballot measure committees. Thus, staff believes the Commission may wish to consider, at this prenotice level, whether other sections of the Act, such as the general contribution limits applicable to candidates, might accomplish the goal of regulating contributions to candidate-controlled ballot measure committees.

The operative language of sections 85301 and 85302 imposes contribution limits "to any candidate for elective state office…." To date, that language has been understood to apply to a candidate's committee for elective state office, as opposed to other committees controlled by the candidate. One could construe that language, however, to apply also in the context of other controlled committees by regarding contributions to such committees as contributions "to" the candidate who holds or seeks elective state office. For instance, contributions to an Assembly candidate's controlled ballot measure committee would be governed by the provisions of subdivisions (a) of sections 85301 and 85302, $3,200 for contributions by persons and $6,400 for contributions by small contributor committees, respectively.

As mentioned, such an approach would be a significant departure from current advice and practice.[12] The impact on the current political practice of candidates would be significant, given

[12] See, for instance, the Recall Election Fact Sheet, adopted by the Commission last summer:

"22. How do the issue advocacy disclosure provisions (section 85310) apply to a state recall?

the present practice of using such committees by current officeholders. Such an interpretation also, of course, implicates the constitutional concerns addressed earlier in this memorandum.[13] Given the novelty of this interpretation, staff would need additional time to consider the ramifications of other provisions of Chapter 5, containing the contribution limits, to determine whether and how other provisions of that chapter, such as net debt fundraising restrictions, would apply. For instance, if the committee is a general purpose ballot measure committee, which exists from election to election, would the limits under section 85301 apply on an annual or one-time basis? Also, such an approach would have to address committees controlled by more than one candidate – is a contributor allowed to contribute up to the amount allowed for *each* controlling candidate? What if one controlling candidate is the Governor, subject to a $21,200 limit, and another controlling candidate is an Assembly candidate, subject to the lower $3,200 limit? Does one limit control for the committee over another? Is a donor allowed to cumulate both limits in a single contribution? What would happen to committees that are in existence that have already accepted contributions in excess of these limits? Issues such as these and others would need to be brought back before the Commission should the Commission wish to pursue further such an avenue to impose limits on candidates' non-elective office committees. Nevertheless, staff believes the Commission may at least wish to consider as a threshold matter whether such an approach is an option to pursue further and has proposed regulatory language that would begin that discussion. (Ex. A.)

III. REGULATORY OPTIONS.

Because the Commission is at the pre-notice stage of the regulatory adoption process, staff has prepared three regulations that will implement the Commission's decisions with respect to the operation of section 85310 and other provisions of the Act at issue. It should be remembered that while various optional approaches are provided, the Commission is under no obligation at this time to make a definitive decision with regard to any of the options proposed. Indeed, at this stage it may be entirely appropriate to approve all of the options and approaches proposed, and even add new ones, for the purpose of soliciting the broadest range of comment possible during the prenotice phase. In light of this fact, staff has withheld specific recommendations, with one exception, regarding the final outcome of given decision points.[14]

Section 85310 requires disclosure of communications identifying a state candidate made within 45 days of an election. This provision is designed to provide disclosure of large payments (over $50,000) for communications used for issue advocacy campaigning. Payments for such election-related communications identifying a state candidate might otherwise go undisclosed because they do not expressly advocate the election or defeat of a state candidate, and are therefore not required to be reported as independent expenditures. The disclosure requirements of section 85310 do apply in a state recall election to certain payments for communications identifying state candidates that are not otherwise disclosed. (If a payment for a communication identifying a state candidate is otherwise reported as an independent expenditure, the payment need not be reported under section 85310.)"

[13] The application of sections 85301 and 85302 in this context were not discussed in the Interested Persons meeting held in February.

[14] Of course, such an approach will impact the timeline for bringing about final adoption.

A. Proposed Regulation 18530.9 – Contributions to Candidate Controlled Ballot Measure Committees. (Ex. A.)

Pursuant to the discussion above in Section II. D. of this memorandum, staff has drafted preliminary language to begin putting shape to an interpretation that the current contribution limits of sections 85301 and 85302 apply to all ballot measure committees controlled by state candidates. Framed as "Decision 1," this threshold decision impacts possible regulatory action under proposed regulation 18531.10, and thus there is a correlating "Decision 1" under that proposal, as well.

The eventual impact of adopting this regulation would be to render unnecessary the language in "Decision 1" of draft regulation 18531.10 (Ex. C) that interprets "made at the behest" language of section 85310, subdivision (c). The impact of this regulation would be to apply the $3,200, $5,300 and $21,200 contribution limits to ballot measure committees controlled by Assembly/Senate, statewide and Gubernatorial candidates, respectively.

If the Commission declines to move forward with this regulation or ultimately rejects its adoption, the issue of interpreting "made at the behest" in subdivision (c) of section 85310 will remain (as discussed below). There, selecting Decision 1, Option A, means that all expenditures made by a candidate controlled committee are made "at the behest" of the candidate. Under Option B, the converse is true – that for the limited purposes of section 85310, subdivision (c), payments by a candidate-controlled committee are <u>not</u> made "at the behest" of the controlling candidate, and therefore the section would not apply to a candidate's committee's own communications under this statue.

B. Proposed Amended Regulation 18531.5 – Recall Elections. (Ex. B.)

Regulation 18531.5 was adopted by the Commission in August of 2003 and interprets section 85315, governing recall elections. Because the current regulation implements the Commission's prior decisions allowing unlimited contributions to candidate controlled ballot measure committees, at least in the context of recall elections, staff has prepared conforming amendments to implement the decisions the Commission renders with regard to sections 85301, 85302 and 85310.

C. Proposed Regulation 18531.10 – Communications Identifying State Candidates. (Ex. C.)

This proposed regulation is the primary interpretation of section 85310. It is profitable to reduce subdivisions (a) and (c) to their elements. The elements are set forth below. Those that are bolded are elements staff has sought to clarify in the regulation:

(a) 1. A person
2. Who makes a **payment of $50,000**+
3. That "**clearly identifies**" a candidate for elective state office
4. but does not **expressly advocate** defeat/election of the candidate
5. **w/in 45 days of an election** must report….

(c) 1. **A payment** received by a person ((a)(1) above)
2. Who makes a communication described above
3. **Is subject to $25,000 limit** of 85303(b)
4**.** If the communication is **made at the clearly identified candidate's behest.**

The issues are discussed in the order in which they appear in the elements above:

1. <u>A Payment of $50,000 or More</u>:

Section 85310 applies to a person who makes a payment of $50,000 or more for a communication clearly identifying a candidate for elective state office. (§ 85310, subd. (a).)

Consistent with Commission interpretation in other areas of the Act, subdivision (b) of the draft regulation aggregates payments to determine whether the $50,000 threshold is met in subdivision (a) of section 85310.

2. "<u>Clearly Identified" Candidates</u>:

Subdivision (a) of section 85310 pertains to a communication that "clearly identifies" a candidate for state elective office. While the statute itself does not define this term, regulation 18225 defines those terms in a different context – defining the term "expenditure." An "expenditure" is defined in regulation 18225 to include "any monetary or non-monetary payment made by any person, other than those persons or organizations described in subsection (a), that is used for communications which expressly advocate the nomination, election or defeat of a <u>clearly identified</u> candidate or candidates, or the qualification, passage or defeat of a clearly identified ballot measure." (Reg. 18225, subd. (b); underlining added.) Subdivision (b)(1)(A) defines "clearly identified" as follows:

> "(A) A candidate is clearly identified if the communication states his name, makes unambiguous reference to his office or status as a candidate, or unambiguously describes him in any manner."

Applying the term "clearly identified" to the matter at hand raises two questions: 1) whether the appearance of a candidate in an advertisement satisfies the definition of "clearly identifies;" and 2) whether the disclosure statement containing the candidate's name and required

with such advertisements by advertising disclosure statutes (regardless of whether the candidate "appears" in the ad) also meets the definition of "clearly identifies."

With regard to the first question, regarding appearances in the communication, application of the term "clearly identifies" to potential advertisements is difficult in the absence of the particular facts surrounding a given communication. It can be argued that so long as the candidate does not 1) state his or her name; 2) mention his or her office or status as a candidate; or 3) describe himself or herself, then the candidate may appear in the advertisement and not implicate this element of subdivision (a) of section 85310. Strictly speaking, nothing in the regulation or statute uses the words "appears" or "appearance" or "features" to describe the covered conduct. (*Cf*., Reg. 18901, subd. (c)(2) (defining scope of mass mailing prohibition to cover items that feature an elected officer to mean the item includes the officer's photograph or signature, or singles out the officer by display of his or name).) As a result, the mere "appearance" by the candidate and discussion of the reasons he or she opposes a proposition may not, in and of itself, constitute clear identification of the candidate.

It must be restated, however, that the inquiry is necessarily a fact-dependent one, one that can spawn multi-layered hypotheticals reaching different conclusions based on only the slightest factual alterations. It may be observed, as well, that the absence of "appears" or similar language in both the statute and the regulation may have a logical explanation: if, as is discussed more fully below, section 85310 was a statute designed to reach issue advocacy by an independent third party that discusses or mentions a given candidate, such as sending out a mailing praising a legislator for a recent vote, then the more limited scope of "clearly identifies" makes sense because the communication would be paid for independently of the candidate (and thus not a contribution and therefore reported as such in the normal course of affairs). Otherwise, the only apparent hook on which to hang an interpretation that equates appearance in an advertisement with "clearly identifies," would be to argue that appearing in an advertisement is the same as "describ[ing] him[self or herself]," under regulation 18225. Since the word "describe" usually connotes an active, verbal endeavor that illuminates the particulars of the object, it would seem a bit of a stretch to say that the use of an image of a person is the same as "describing" oneself. (See Webster's Third New Int'l Dict., (1993), at p. 610 ("to represent by words written or spoken for the knowledge or understanding of others;" "to communicate verbally from the results of personal observation an account of salient identifying features of (something existing in space);…").)

The second question of application asks whether the advertising disclosure required by sections 84503 and 84504, which as applied require a candidate's name to appear in any advertisements, would satisfy the elements of "clearly identifies." On its face, such disclosure clearly "states his name" or her name (regulation 18225) and is therefore within the scope of the regulation. While the question has been raised whether the Commission would implement a policy based on the required disclosure of the advertising requirements, nothing in the statute or regulations indicates that disclosures required by law are not within section 85310's purview.

Subdivision (a)(1) of the proposed regulation borrows verbatim the definition of "clearly identified" from existing regulation 18225 to include the references contained therein.[15] *"**Decision 2**" of the proposed subdivision provides optional language to include visual depiction of the candidate. Finally, "**Decision 3**" provides optional language clarifying whether legally required disclosure suffices, in and of itself, to meet the definition of "clearly identified."*

3. <u>Express Advocacy</u>:

Another important element of subdivision (a) of section 85310 is the limitation of the statute to communications that do not "expressly advocate the election or defeat of the candidate." The issue has been raised by others whether the appearance of a candidate in such advertisements, without using magic words advocating the candidate's election, while the candidate also is running for office (such as the existing circumstances) would nevertheless constitute "expressly advocate[ing]" the candidate's election. One must be mindful that if such a communication *were* found to constitute express advocacy, the statute would not apply. In any event, because the law governing words of express advocacy is fairly specific in its limitation, it is highly unlikely that such conduct would constitute express advocacy.

Turning to the Act, regulation 18225, subdivision (b)(2), states:

> "A communication 'expressly advocates' the nomination, election or defeat of a candidate … if it contains express words of advocacy such as 'vote for,' 'elect,' 'support,' 'cast your ballot,' 'vote against,' 'defeat,' 'reject,' 'sign petitions for' or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election."

Assuming that the communications contemplated do not use the specific words above with regard to a given candidate, then it is highly unlikely such communications would constitute express advocacy. This is especially true in light of the recent California court rulings on these matters,[16] which disfavor a contextual-based analysis and prefer a "magic-words" type test. In the event such communications *were* found to be express advocacy, the expenditures for them would then subject the person making the contribution to different provisions of the Act governing committees that support or oppose candidates.

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[15] Another option is to amend regulation 18225 directly. Otherwise, the Commission may elect to make conforming changes to regulation 18225 at a later date.

[16] The decisions referenced here are *Schroeder v. Irvine City Council et al*, 97 Cal.App. 4th 174 (review den. June 26, 2002), and in *The Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4th 449 (review den. December 22, 2002).

Subdivision (a)(2) refers to the Commission's existing definition of "expressly advocate" found in regulation 18225, subdivision (b)(2). There is no apparent reason for a different definition and staff therefore proposes cross referencing that regulation.

4. <u>Within 45 days of an Election…</u>:

Section 85310 applies to a communication that is made "within 45 days of an election…." The issue here is whether "an election" refers to a ballot on which the candidate appears or whether the term literally refers to any elections – local, special or otherwise – regardless of whether the candidate "clearly identified" is even on a ballot.

The policy determination to be made is whether the Commission believes the statute is intended to sweep broadly so that any election triggers its provisions or whether there is an important nexus between the communication and the appearance of the candidate on a ballot. Read as a whole, to the extent the statute appears intended, in some form, as a check on the abuse of issue advertisements run as surrogate campaign advertisements, certainly linking the candidate's appearance in the advertisement to the proximity of his or her election is a logical one. It should be noted, as well, that such an interpretation helps to insulate the statute from attack on constitutional grounds, to the extent that an overbroad application would impinge on legitimate First Amendment activity.

*While providing optional language in subdivision (c) of the proposed regulation, staff recommends the Commission proceed at the prenotice phase with the language in "**Decision 5, Option B**" and limit the statute's application to communications occurring within 45 days of an election for which the candidate identified is on the ballot.*

5. <u>Payments Subject to the $25,000 Limit</u>:

Subdivision (c) of section 85310 states:

> "(c) **Any payment received** by a person who makes a communication described in subdivision (a) **is subject to the limits** specified in subdivision (b) of Section 85303 if the communication is made at the behest of the clearly identified candidate." (Emphasis added.)

Section 85310 applies to communications for which payment of $50,000 or more was spent. Subdivision (c), however, applies a $25,000 contribution limit *to the person making the communication* if it was made at the candidate's behest. Importantly, the language of subdivision (c) does *not* apply its limit only to monies used to pay for the communication, but to "any" payment "received" by that person. The use of such broad language suggests that the statute applies in an almost retroactive manner, meaning that once a committee makes a communication described in subdivision (a), the person may not have received more than $25,000 prior to making the contribution. In this way, the limit acts as a prerequisite to the

expenditure, operating much like a prerequisite in a scholastic setting – one cannot take class B if one has not taken class A. Though grammatically awkward, the statute is subject to the operation whereby once a person wishes to make the expenditure identified in subdivision (c), the person must first be able to satisfy the contribution limit contained therein.

Of course, it can be argued as well that the statute's limitation should only be applied prospectively – that is, once a person makes a communication identified in subdivisions (a) and (c), the $25,000 applies from that point forward. The obvious problem with this construction, however, is that it essentially eviscerates whatever reach the statute was intended to have. Under this construction, a crafty candidate and other person could raise all the necessary funds from a single contributor, coordinate on the communication to be made, and then make the communication. From that point forward, while the statute's limitations would obviously apply to future payments to the person making the communication, the statute would have no meaningful application because the fundraising will have occurred *prior* to the triggering event.

*Subdivision (d) of the proposed regulation provides two options in "**Decision 6**" that implement either interpretation above. Under "**Option A**," the statute is interpreted to apply a prerequisite to funding the communications at issue. The first sentence describes the breadth of the term "any payment" in the statute to apply to "all contributions received by a committee" regardless of "whether the funds are used to pay for the communication at issue." The second sentence spells out the consequence of receiving a contribution in excess of the limit referred to in subdivision (c), indicating that that person may not make a payment for a communication covered by the statute. Finally, to give the most strength to that subdivision and avoid the potential for gamesmanship inherent in a LIFO/FIFO system of attribution, the last sentence of the subdivision clarifies existing law that committees may not simply create a new committee and transfer with attribution monies from an existing committee.*

*"**Option B**" implements the converse of "A" and allows committees to segregate funds to allow the committee to accept contributions in excess of the limits of subdivision (c) so long as those funds are not used to fund the communication governed by the statute.*

6. <u>Communications Made at the Candidate's Behest</u>.

The issue of whether a controlled ballot measure committee makes payments "at the behest" of the controlling candidate is discussed above in section II.B. of this memorandum. *Staff has provided, in subdivision (a)(3) of the proposed regulation, that the existing definition of "made at the behest" as found in regulation 18225.7 be used in this regulation. "**Decision 1**" implements with optional language either Commission conclusion as to this issue.*

Recommendation: Staff recommends the Commission proceed with each of the approaches described above, maintaining the optional language in all decision points (with the exception of "Option 5A" language in regulation 18531.10) to facilitate the broadest

possible commentary and input. Staff will then bring the matter back before the Commission in June with recommendations for final adoption.

Attachments:

Ex. A – Proposed Regulation 18530.9.
Ex. B – Proposed Amended Regulation 18531.5
Ex. C – Proposed Regulation 18531.10
Ex. D – Regulation 18225.7